IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

SPL. APPL. WRIT No. 436 of 1998

B.S.KATYAL
V/S
STATE & ANR

Mr. MS SINGHVI, for the appellant / petitioner

Mr. BL BHATI, A.G.A.,for the respondents.

Date of Order : 4.12.2007

HON'BLE SHRI N P GUPTA,J.
HON'BLE SHRI MUNISHWAR NATH BHANDARI,J.

JUDGMENT

Aggrieved by the judgment dated 19th February, 1998, appellant has preferred this appeal. Brief facts relevant to the present matter are that the appellant was initially appointed as Weaving Master-cum-Designer vide order dated 26.11.1957. Thereafter, the appellant was confirmed on the post of Designer at Handicraft Development Centre, Jaipur w.e.f. 1.4.1970, inasmuch as w.e.f. 1.3.1966, the appellant was posted Designer at Handicraft Development Centre, Jaipur. The appellant was then promoted on the post of Superintendent-cum-Designer, Handloom Designe centre, Kithoon w.e.f. 14.5.1970 and was further promoted to the post of Assistant Director (Technical) w.e.f. 28.3.1972. Both the promotions were made on ad hoc basis. Vide order dated 9.2.1972,appellant's lien was suspended from the post of Designer (Handicraft). When the appellant was not

confirmed on the post of Assistant Director and persons junior to him were promoted as Deputy Director, the appellant filed a writ petition which was then withdrawn, with liberty to file a fresh petition. The appellant then filed a fresh petition, being No.1480/83 and the same was decided on 3.9.1986 with a direction to the respondents to consider the matter of the appellant's confirmation on the post of Assistant Director and also decide his seniority and question of future promotion. When the directions given by the High Court were not complied with, then appellant preferred a contempt petition and after filing of the contempt petition, the respondent passed an order on 14th July, 1987, whereby the appellant was made substantive on the post of Superintendent-cum-Designer against the vacancy of 1985-86 and was further being given confirmation to the post of Assistant Director. Aggrieved by the order passed in the year, 1987, appellant again preferred a writ petition, claiming that the appellant should have been treated substantive on the post of Superintendent-cum-Designer w.e.f. 1.1.1972 and was to be given promotion to the post of Assistant Director in the year, 1976 and to assign the correct seniority position as a consequence thereof. The main ground taken therein was that if the appellant would have been continued on the post of Designer without suspending his lien, then also, he was entitled to promotion to the post of Superintendent-cum-Designer and further promotions to the post of Assistant Director as

well as Deputy Director. However, for the reason that the appellant was promoted to the post of Superintendent-cum-Designer and post of Assistant Director on ad hoc basis, his right of consideration for promotion from the post of Designer could not be looked into by the respondent and, at the same time, two persons, junior to the appellant, namely, Bihari Lal Teng and Sayed Iqbal Ahmed were absorbed on the post of of Assistant Director in the year, 1976. It was stated that both the junior persons were declared surplus by the Department, being the junior to the appellant and, thereafter, absorbed in the State Woolen Mills, Bikaner under the Rajasthan State Enterprises Department. Both of them were then absorbed on the post of Assistant Director, again by the respondent Department in the year, 1976, ignoring the right of consideration of the appellant to confirm him on the post of Assistant Director, prior to absorption of two officials named above.

The respondents had given detailed reply to he averments made in the writ petition. It was contended that the petitioner was rightly being made substantive on the post of Superintendent-cum-Designer as well as given promotion to the post of Assistant Director in the year, 1987, inasmuch as claim of the petitioner for his promotion to the post of Assistant Director in the year, 1976 is not legally sustainable as till the amendment in the rules in the year 1980, the post of Assistant Director was to be

filled 100% by way of direct recruitment. Thus, the appellant could not have been given promotion against a post meant for direct recruitment only. It was further clarified that the appellant's case was considered in a specific term pursuant to the recommendation made vide Annexure-9 by the Assistant Secretary to the Department, showing a vacant post against the vacancy of the year, 1980-81. The recommendation so made vide Annexure-9 dated 2nd January, 1987, was dealt with by the Department in its letter dated 27th February, 1987 (Annex.R/1). In the said letter, it was noticed that in the year, 1980-81, ten posts of the Assistant Director (Technical) were existing and all the posts were occupied by the officials named in the said letter. It was specifically mentioned that so far as the appellant is concerned, he was confirmed on the post of Designer (Handicraft), which was then existing in the pay-scale of Rs.625 – 1120 and another post, being Designer (Handloom) in the pay scale of Rs. 610 – 1090. Hence, the appellant was not falling in the tenor of promotion on the post of Superintendent-cum-Designer (Handloom). It has further been clarified that 25% quota for promotion was made for the post of Assistant Director (Technical) by way of amendment, therefore, prior to amendment, the appellant could not have been given the post of Assistant Director and since subsequent to the amendment, the post of Assistant Director (Technical) was not lying vacant and even earlier to amendment, the appellant was not coming in

the tenor of promotion, being appointed on the post of Designer Handicraft and not Designer Handloom, therefore, he was not otherwise eligible to seek promotion on the post of Assistant Director. It was further contended that to extent the benefit to the appellant of the post of Assistant Director, even supernumerary post of Superintendent-cum-Designer was created and it is thereafter, that the appellant was given promotion to the post of Assistant Director against the vacancy of the year, 1985-86 as he was not recommended for the vacancy of the year, 1984-85 by the Departmental Promotion Committee (DPC). The reply further contains the fact that pursuant to the Notification dated 24.9.1983 amendments were made in the Rajasthan Industries Subordinate Service Rules, 1966 which is as also having same bearing on the present matter as certain posts were abolished. Even prior to it, on 30.4.1980, the Government issued a Notification, whereby also, the Rules were amended and therein, a provision was kept for filling up the post of Assistant Director by way of promotion to the extent of 25% of the posts/vacancies.

Considering the issues raised in the writ petition as well as objections taken for maintainability of the writ petition, the learned Single Judge dismissed the writ petition. However, the learned Single Judge gave a direction that since the petitioner has already retired during the pendency of the writ petition, thus he should be

awarded retirement benefits, if such benefits are not already extended.

Mr. M.S. Singhvi,learned counsel, appearing for the appellant, urged that the appellant having been promoted to the post of Assistant Director, way back in the year, 1972 and, thereafter, continued on the said post without any interruption, then, confirmation of the said post vide order dated 5.8.1987 is wholly unjustified, more so, if no vacancy of the Assistant Director was existing, then as to how the appellant was continued on the said post and once for whatever reason, the appellant was continued on the post of Assistant Director from the year, 1972, then he ought to have been confirmed in the year, 1976, i.e., prior to absorption of persons junior to him, namely B.L.Teng and Sayed Iqbal Ahmed. It was further submitted that the appellant could not have been non-suited for alternative remedy under the provisions of the Rajasthan Civil Services Appellate Tribunal, after keeping a writ petition pending for several years, apart from the fact that the plea of res judicata as considered by the learned Single Judge was not available to the respondents as it was for the first time that the respondent passed an order on 5.8.1987 which then was a subject-matter of the present petition and the said order was not earlier existing so as to give cause to the appellant to challenge the action of the respondent, for attracting an objection of res judicata. Thus, according to

the learned counsel, the learned Single Judge was not right in taking note of the aforesaid two objections regarding maintainability of the petition and, at the same time, to dismiss the petition on merit, without considering the true facts relevant to the matter.

We have heard the learned counsel for the parties and carefully perused record to consider the merit of the case, ignoring the objection of res judicata as well as availability of alternative remedy, as was considered by the learned Single Judge, because even the learned Single Judge had decided the case, after considering the merit of the writ petition.

The contention of the learned counsel for the appellant is that he was promoted on the post of Assistant Director in the year, 1972, thus, should have been confirmed on the said post from the date ad hoc promotion was given or in the alternative, should have been promoted on the said post on regular basis in the year, 1976, i.e., prior to absorption of two persons junior to him. The action of the respondent, was thus, questioned when the appellant was continued on the post of Assistant Director for such a long time, then, confirmation on the said post of Assistant Director cannot be denied on any ground whatsoever, more so, when the appellant was taken on the post of Designer (Handicraft) and even was confirmed as per Rules then

existing, he was eligible to be promoted on the post of Superintendent-cum-Designer. However, the said right of consideration of the appellant was also denied. We have considered the submissions of the learned counsel. However, looking to the Rajasthan Industries Subordinate Service Rules, 1966 shows the avenue of promotion to the post of Designer (Handicraft) was separately existing before amendment of the rules and sofar as the post of Superintendent-cum-Designer Handloom Design Centre is concerned, same was provided from the post of Junior Jacquard Master Designer and Inspector Handloom in Group 'C', but in the said group, the post of Designer exists in the name of Designer Handloom and not Designer Handicraft which otherwise was separately shown in the Rules prior to its amendment with separates avenue of promotion, therefore, so far as the contention of the learned counsel for the appellant that if he would have been continued on the post of Designer (Handicraft) then also, eligible for promotion to the post of Superintendent-cum-Designer Handloom and Assistant Director (Technical), cannot be accepted, in the light of Rules, 1966. Further more, if we look at the prayer of the petition, then it reveals that it was not the prayer of the appellant to claim a right of consideration by treating him on the post of Designer (Handicraft). Hence, this claim of the appellant cannot be accepted.

So far as the other claim of the appellant, i.e., confirmation on the post of Assistant Director (Technical) from the year, 1972, i.e., from the date the ad hoc promotion was given on the said post, is concerned, same is considered again in the light of the Rules as well as facts available on record, though the order of ad hoc promotion to the post of Assistant Director (Technical) is not on record, hence during the course of arguments, learned counsel for the appellant was specifically asked as to whether dehors the Rules if the appellant was given the post of Superintendent-cum-Designer Handloom, though promotion on the said post can be given only from the post mentioned in the Schedule appended to the Rules which includes the post of Designer and the post of Designer ultimately named in the Schedule is Designer (Handloom) which is the post never held by the appellant as he was only Designer (Handicraft). Thus, the ad hoc promotion, in those circumstances, cannot be said to be in accordance with the rules and obviously, if some benefit has been given dehors the rules, a person cannot claim equity which ultimately result even in perpetuation of illegality. In those circumstances, the appellant's claim for confirmation on the post of Assistant Director (Technical) from the date of his ad hoc promotion cannot be accepted. Now, coming to the claim of the appellant to confirm him on the post of Assistant Director from the year, 1976, i.e., the date prior to absorption of the two employees, namely, B.L.Teng

and Sayed Iqbal Ahmed, is concerned, again a look at the Rules clearly shows that the post of Assistant Director was then meant to be filled 100% by way of direct recruitment till the year, 1980. In those circumstances, benefit of promotion cannot be claimed by any employee, hence the claim of the appellant to promote him on the post of Assistant Director from the year, 1976, cannot be accepted. Now, looking to the amendment in the rules, as mentioned above, it reveals that 25% quota for promotion to the post of Assistant Director (Technical)was provided, we have even looked into the claim of the appellant to atleast promote him on the post of Assistant Director against the vacancy of the year, 1980-81, i.e., immediately after the amendment of the rules, whereby promotional quota was provided for the post of Assistant Director (Technical). In this regard, we have perused the recommendation as exist in Annexure-9 along with Annex.R/1. So far as Annexure 9 is concerned, though it has been mentioned that the appellant should be considered against the vacancy of the year, 1980-81, but then, look at the letter at Annexure R/1 shows that the recommendation as was made in the Annexure-9, was properly dealt with by giving detail reasons, including the fact that at the relevant time, only 10 vacancies of Assistant Directors were existing and those posts were filled up by the persons named in the letter. Thus, no vacant post of the Assistant Director was existing against the vacancy of the year,

1980-81. Hence, an employee cannot claim benefit of promotion without existence of vacancy in the relevant year. Therefore, even the last contention of the learned counsel for the appellant that he should have been given promotion/confirmation on the post of the Assistant Director against the vacancy of the year, 1980-81, also cannot be accepted.

Thus, in substance, even if the issues of alternative remedy and res judicata are ignored and are so ignored, the appellant is not found entitled for any relief as otherwise denied by the learned Single Judge. Hence, we do not find any illegality in the judgment passed by the learned Single Judge and more so, while hearing the appeal, the questions raised, during the course of arguments, have been dealt with, on its merits.

In view of the above discussion, we find no merit in the appeal and the same is dismissed with no order as to costs.

(MUNISHWAR NATH BHANDARI),J. (N P GUPTA),J.

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